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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 193

THE CONNECTICUT FIRE INSURANCE COMPANY,

Petitioner,

—against—

ALLEN N. SPOONER & SON, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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—against—

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled action.

The numerals in parentheses followed by the letter "a" refer to the pages of the printed appendices filed in the Court of Appeals.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 314 Fed. 2d 753 (1963). The opinion of the United States District Court for the Southern District of New York is reported at 206 Fed. Supp. 495 (1962).

Jurisdiction

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1).

The grounds on which such jurisdiction is invoked are that (1) the Court of Appeals for the Second Circuit and the Court of Appeals for the Fifth Circuit are directly in conflict with respect to an important question of federal law; and (2) the Court of Appeals for the Second Circuit has disregarded prior decisions of this Court interpreting marine insurance clauses at issue herein.

The date of the judgment of the Court of Appeals for the Second Circuit sought to be reviewed and the date of its entry is March 11, 1963.

Questions Presented for Review

1. Did the Court of Appeals correctly disregard an early decision of this Court in order to apply English law and precedent which the Court of Appeals conceded was in conflict with the earlier decision of this Court?

2. Was the loss of the "PULLING MACHINE No. 12" caused by a "peril of the harbors, bays, sounds or seas" as the phrase is used in a policy of marine hull insurance written in the United States on a vessel designed for use in harbors and inland waters?

3. Is the negligence of an owner or demise charterer insured against under the so-called Inchmaree

clause of a policy of hull insurance if such negligence occurred while the owner or charterer was acting in the capacity of Master of the insured vessel and while such owner or charterer was a named assured under the policy?[1]

Statement

This is an action in Admiralty under a policy of marine insurance. The United States District Court had jurisdiction under 28 United States Code, Sec. 1333(1).

On July 24, 1958 a floating derrick barge named the "PULLING MACHINE No. 12" (No. 12) was severely damaged while engaged with other vessels in an attempt to raise the sunken tanker "EMPRESS BAY" from the middle of New York's East River a short distance above the Brooklyn Bridge. Previously a contract for removal of the wreck had been awarded by the United States to one Richard W. Stasch, doing business as R. W. Stasch & Company (hereinafter called "Stasch"). Stasch, on July 15, 1958, demise chartered the No. 12 from the owner, Allen N. Spooner & Son, Inc., for use in raising the wreck. Petitioner, insurer of the No. 12, consented to the demise charter and for an additional premium agreed to in-

[1] The version of the clause in the policy at issue reads as follows:

> "This insurance also specifically to cover (subject to the average and all other conditions of this policy not conflicting herewith) loss of or damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, . . . provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager. . . ." 27a.

crease the insured value thereof to $35,000 and to add Stasch as a named assured under the policy (27a).

On July 23, 1958 the No. 12 was towed out over the wreck and her lifting block made fast to one end of several wire slings which had been previously placed under the stern of the "Empress Bay". Two other units were also engaged with the No. 12 in this operation, all under the control of Stasch (28a). On the afternoon of July 24, 1958 the operation began—the plan being to lift the "Empress Bay" off the bottom and pull her over to shallow water along the Brooklyn shore. The weather was partly cloudy with good visibility and a light southerly wind (29a). The water was calm and the tide was ebbing at 3.1 knots (29a). Coast Guard vessels were stationed above and below the site of the wreck to hold back vessel traffic while the salvage operation was going on. However, the Coast Guard blockage was not completely effective and vessels continually passed up and down the river (31a). Among the equipment on board the No. 12 were so-called side slings commonly used on derricks of her type to maintain the lifting cable in a vertical position (31a).

"Stasch was in charge of the operation and transmitting orders by a power microphone (29a). At the time of the accident he was standing on the bow of the No. 12. At about 5:00 p.m. he had signalled the engineers on the No. 12 and the other derrick to commence a gradual lift. After a period of slow lifting he had ordered the No. 12 and the other derrick to stop. The No. 12 was then under a load of approximately 250 tons. Her side slings had not been put in place by Stasch and consequently the No. 12 could tilt only

3 degrees or so to starboard before her port guy wire would be subjected to a breaking stress of 98,500 pounds (31a).

The tug "ROSLYN", also engaged in the operation, was connected by a tow line to the stanken "EMPRESS BAY" and upon orders from Stasch she began to go ahead slowly on her engines. The tug had been pulling about 20-30 minutes when the forward port guy wire of the No. 12 suddenly parted causing her leader frame to fall over to starboard as a result of which the No. 12 was declared a constructive total loss.

The District Court found that a large vessel, sufficient to create a substantial swell, passed the neighborhood of the No. 12 at or just before the accident and that these swells were a culminating factor in causing the accident (31a, 38a); that Court further found that Stasch had negligently failed to use the side slings which were available on board the No. 12 and that Stasch's negligence in this respect resulted in the accident (31a).

The District Court, however, as a matter of law held that the swells created by the passing vessel did not constitute a peril of the sea as the phrase was used in the policy on the No. 12 (40a). It further held that although Stasch was negligent in not using the side slings, the fact that Stasch was also the demise charterer of the vessel barred a recovery under the so-called Inchmaree clause of the policy as the loss or damage did not occur without a lack of due diligence on the part of Stasch as owner *pro hac vice* of the vessel.

The Court of Appeals accepted the findings of fact made by the District Court but reversed both the aforesaid conclusions of law and directed that judgment be entered for the respondent.

Reasons for Granting the Writ

A

The decision of the Court of Appeals is in direct conflict with a recent decision of the Court of Appeals for the Fifth Circuit in the case of *Reisman* v. *New Hampshire Fire Insurance Company*, 312 Fed. 2d 17 (1963).

The Court of Appeals premised its holding that the loss of the No. 12 was not a result of a "peril of the sea" squarely on its prior decision in the case of *New York, New Haven and Hartford Railroad Company* v. *Gray*, 240 Fed. 2d 460, cert. den. 353 U.S. 956 (1957) (72a). In that case underwriters at Lloyds had issued in London, England, two policies of marine insurance covering railroad cars and their contents while afloat on the assured's barges—consequently, what was involved in fact in that case was a policy of cargo insurance. However, this policy contained the usual Lloyds perils clause, "Touching the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this voyage, they are, of the Seas. . . ."[1]

The District Court had denied a recovery on the ground that the loss was not caused by a peril of the sea. According to its findings of fact, accepted by

[1] Gilmore and Black, *The Law of Admiralty*, p. 64, footnote 79.

the Court of Appeals, the loss was caused by the leaking of sea water into the car float causing her to list and to dump her cargo into the river. The Court of Appeals, in reversing the District Court, stated as follows:

> "The loss resulted from a 'peril of the seas.' 'It is enough that damage be done by the fortuitous action of the sea. For instance, where cargo was damaged by the incursion of seawater through a hole in a pipe gnawed by rats, the House of Lords held this to be a peril of the seas.' That the sea is calm makes no difference. Negligence, whether or not 'gross,' but for which the accident would not have occurred, will not serve as a defense to such a policy. Only 'wilful misconduct,' measuring up to 'knavery' or 'design,' will suffice; and neither the evidence nor the judge's findings of fact show such conduct."

This decision, and therefore its decision in the present case, is squarely at odds with the recent case in the United States Court of Appeals for the Fifth Circuit, *Reisman* v. *New Hampshire Fire Insurance Company*, 312 Fed. 2d 47 (1963).

In the latter case a houseboat sank at its pier, due again to the mere incursion of sea water, this time through a worm-eaten bottom. Claim was made against underwriters under a customary form of marine insurance policy on the basis of a peril of the sea. The Court of Appeals for the Fifth Circuit affirmed the dismissal of the complaint, stating:

> "The term 'perils of the sea' as used in marine insurance policies does not mean that the policy

covers all losses that occur upon the sea. As stated in Appleman Insurance Law and Practice, Vol. 5, §3272:

> 'A marine policy protects against extraordinary accidents and perils, but not against natural decay and ordinary wear and tear.'
>
> "Damage to the bottom of a boat by worms, in an area where worms ordinarily cause such damage, is not an extraordinary or fortuitous peril of the sea which cannot be avoided by human skill and prudence. The loss in this case was an excepted peril and not within the coverage of the policy. Hazard's Administrator v. New England Marine Insurance Co., 8 Pet. 557, 33 U.S. 557, 8 L.Ed. 1043; Arnold on Marine Insurance, 13 Ed. §825."

The case of *Hazard's Administrator* v. *New England Marine Insurance Co.*, 8 Pet. 557, 33 U.S. 557, 8 L.Ed. 1043, cited by the Court of Appeals for the Fifth Circuit in support of its ruling, is the same case which the Court of Appeals for the Second Circuit, in the present case, acknowledged as reflecting early law of this Court contrary to the English law admittedly applied by the Second Circuit therein (72a).

In reading the opinion of the Court of Appeals for the Second Circuit in the present case and in the *Gray* case and the opinion of the Court of Appeals for the Fifth Circuit in *Reisman* v. *New Hampshire*, supra, it is obvious that the Circuits are directly in conflict on this point. These circuits are those from which most of our marine insurance litigation has emanated during the past twenty years. In the pres-

ent case the Second Circuit disapproved of cases cited by petitioner, and by the District Court in its opinion, on the ground that they arose out of disputes involving the carriage of goods by sea and therefore were not applicable to a policy of marine insurance.[1] On the other hand, the Court of Appeals for the Fifth Circuit in *Reisman* v. *New Hampshire*, supra, cites with approval a recent cargo case in the Second Circuit, *R. T. Jones Lumber Co., Inc.* v. *Roen Steamship Co.*, 2 Cir. 1959, 270 Fed. 2d 456, wherein the Court stated:

> "Perils of the seas are understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence."

The above case involved a suit by a cargo owner against a barge and her owner for damages arising out of loss of cargo in a storm. In this respect alone, therefore, the Circuits are in conflict, and a continuing line of divergent opinions may be expected involving identical insuring clauses and closely analogous fact situations.

The cases of *New York, New Haven and Hartford Railroad Company* v. *Gray*, supra, and *Reisman* v. *New Hampshire Fire Insurance Company*, supra, are irreconcilable. Under the rule of the *Gray* case the

[1] See *The Xantho*, 12 App. Cas. 503, 509 (1887); *Blackburn* v. *Liverpool, etc. Steam Navigation Co.*, 1 K.B. 290 (1902), in which the House of Lords has held that the phrase "peril of the seas" should receive the same construction whether occurring in a contract of carriage or in one of marine insurance.

Fifth Circuit would have been compelled to allow a recovery in the case of *Reisman* v. *New Hampshire Fire Insurance Company*, supra.

The *ratio decidendi* of the *Gray* case is reflected in the following language from the assured's brief in that case referred to as follows by the Court of Appeals:

> "There is much to be said for the following statement made in its brief by appellant: 'It was also the result of the actions of the sea upon her in that condition, the place and way she was moored, the words chosen by those reporting her trim to the dispatcher, and a thousand other circumstances. As a matter of hindsight, every happening is the inevitable result of its causes, but as a matter of foresight, no one can predict what causes will be operating at any given moment. Therein lies the element of fortuity that must form an element of a recoverable insurance loss. * * * It is against the unpredictable happenstance of loss through whatever set of circumstances * * * that men take out insurance policies. * * * Loss was not inevitable until water started pouring down *Carfloat 60's* ventilators less than a half hour before the loss occurred." (240 Fed. 2d 460, 465, footnote 7).

In summation on this point, what the *Gray* decision has accomplished, as admitted by the same court in the present case, is to establish as the law applicable to marine insurance policies litigated in the Second Circuit the English precedents that the mere incursion of sea water, unless willfully allowed to

enter, is a peril of the sea.[1] This writ should be granted on this ground alone.

B

The decision of the Court below is in conflict with prior decisions of this Court.

As pointed out in "A" above, the Court of Appeals for the Fifth Circuit supported its decision in *Reisman* v. *New Hampshire Fire Insurance Company*, supra, on an early decision of this Court which is a landmark case in the jurisprudence of marine insurance, viz., *Hazard's Administrator* v. *New England Marine Insurance Co.*, 8 Pet. 557, 33 U.S. 557. The Court of Appeals for the Second Circuit, however, in the present case, after recognizing the fact that English courts have "consistently given the perils clause a broad meaning", observed that:

> "Several early decisions in this country departed from this view, and held that 'perils of the sea' pertained only to extraordinary and calamitous occurrences. See *e.g. Hazard's Administrator* v.

[1] It has been well settled law in England since the case of *F. Samuel & Co., Ltd.* v. *Dumas*, 1924 A.C. 431, that the mere incursion of sea water is a peril of the sea—unless deliberately allowed to enter the vessel. Prior to this case the law in England had been similar to that applied in the United States. For example, in the case of *Mountain* v. *Whittle*, 125 L.T. Rep. 193, (1912) A.C. 615, the Court stated:

> "If the water was in a normal condition and got into the houseboat simply owing to the defective character of the seams there would be no loss by peril of the seas—the loss would have been by the defective condition of the vessel. A loss caused by the entrance of sea water is not necessarily a loss by perils of the seas. There must be some special circumstance, such as heavy waves causing the entrance of the sea water, to make it a peril of the seas."

New England Marine Ins. Co., 33 U.S. (8 Peters) 557, 583 (1834); *Arbib & Houlberg, Inc.* v. *Second Russian Ins. Co.*, 294 Fed. 811, 816 (2d Cir. 1923)."

It then, extraordinarily enough, allegedly with the sanction of this Court, indicated that it saw no reason why it should not seek guidance from the English authorities (72a).

The case of *Standard Oil Company* v. *United States of America*, 340 U.S. 54, which the Court of Appeals for the Second Circuit cites to support its recourse to English law in the present case, merely restated the well established concept that uniformity in marine insurance contracts is desirable. Apart from the fact that this Court refused in that case to follow contrary decisions of the House of Lords, no suggestion was contained therein that the desirability for uniformity should be pursued to the extent that the law applied would be inconsistent with prior decisions of this Court.

In the case of *Compania de Navegacion Interior, S.A.* v. *Fireman's Fund Insurance Company*, 277 U.S. 66, this Court was again called upon to consider the meaning of the phrase "peril of the sea" in a marine insurance policy. It acknowledged the law to be as expounded by Justice Story in *The Reeside*, 20 Fed. Cas. 11657, p. 458 (2 Sumner 567), which was on all four's with the subsequent decision of this Court in *Hazard's Administrator* v. *New England Marine Insurance Co.*, supra, but distinguished *The Reeside*, supra, as follows:

> "But we think the definition of 'dangers of the sea' by Justice Story was meant by him to be

> applied in the ordinary case of a sea-going vessel with no special circumstances as to the exceptional character of the vessel known to both parties and recognized by both in a high premium charged and paid. A contract of maritime insurance is usually not different from any other contract except that the words and phrases used may have a technical nautical meaning to be understood by the parties and enforced accordingly."

The present case does not involve payment of a higher premium by an assured in recognition of special circumstances of the insurances. There is nothing in the record to indicate an agreement between the assured and the petitioner that other than the customary perils of the sea were to be insured against by the policy in suit. Accordingly, the law in the United States as expounded by this Court is still the law as initially laid down in the case of *Hazard's Administrator* v. *New England Marine Insurance Co.*, supra.

Under the policy at issue the negligence of masters or mariners is insured against provided that the loss or damage does not result "from want of due diligence by the owners of the ship, or any of them, or by the manager. . . ." (27a).

The assured urged in both the courts below that if the loss was not caused by a "peril of the sea" it was caused by the negligence of the demise charterer, who had failed to use certain equipment on board the vessel the use of which, the assured's experts testified, would have avoided the loss. The District Court con-

cluded that although the demise charterer may have been acting in the capacity of master of the vessel the demise charterer was the owner *pro hac vice* of the vessel and for the purposes of policy coverage his negligence was excluded by the proviso above set forth.

The Court of Appeals reversed this holding, admittedly without finding authority directly in point and without any support from the record in the District Court. It did so by assuming that the draftsmen had designed this clause to insure against so-called sea-going or operational negligence of a master (whether or not he was also the charterer or owner) but to exclude damage due to the failure of the shipowner's managerial staff properly to prepare or equip the vessel for the voyage. The Court of Appeals then concluded that as the accident resulted from negligence of the demise charterer while acting as master, the assured was entitled to recover under the policy (77a). This was intellectual legerdemain at its apogee. As stated in the case of *Maryland Casualty Company* v. *Hallatt*, 295 Fed. 2d 64:

> "While insurance contracts are to be liberally construed in favor of the insured, yet such contracts are subject to the same rules of construction applied to other contracts, and language used in a policy of insurance is to be given its popular and usual significance unless the context requires a different construction."

There is no justification at law or otherwise for the interpretation placed by the Court of Appeals on the provisions of the so-called Inchmaree clause discussed above. On the other hand, the Court of Appeals had

adequate guide posts from this Court to resolve the dispute in favor of underwriters.

In the case of *Dampskibsselskabet Dannebrog* v. *Signal Oil & Gas Co. of California*, 310 U.S. 268, 1940 A.M.C. 647, this Court defined the word "management", when applied to a vessel, to mean the direction and physical or managerial control of the vessel. The District Court found that the No. 12 was in charge of a demise charterer (27a, 46a). It needs no extensive citation of authority to prove that as such the demise charterer had the direction and physical or managerial control of the vessel (Gilmore and Black, *The Law of Admiralty*, p. 171; 80 *Corpus Juris Secundum*, Sec. 34).

In the case of *George M. Whiteman* v. *Rhode Island Insurance Company*, 78 Fed. Supp. 624, the United States District Court for the Eastern District of Louisiana was called upon to interpret the provision in a policy of marine hull insurance providing that any change in management would render the policy null and void. It referred to the case of *Dampskibsselskabet Dannebrog* v. *Signal Oil & Gas Co. of California*, supra, in this Court as describing the effect to be given to the word "management" in a marine insurance policy and then decided that a breach of the insuring conditions had taken place. As stated by that Court:

> "A contract of marine insurance must be interpreted in the light of sound comon sense."

Even if not an owner within the purview of the due diligence proviso of the so called Inchmaree clause as held by the District Court, Stasch certainly was a

manager within the ambit of a prior decision of this Court as interpreted by a lower Federal Court for the Eastern District of Louisiana.

C.

The questions presented above are of vital importance to the marine insurance industry and to the shipping and boating interests in the United States. As interpreted by the Court below any accident on the sea provided it was not deliberately contrived by the assured is a peril of the sea.

The scope of the coverage afforded by insurances against "perils of the seas" in a policy of marine hull insurance is of concern not only to the marine insurance industry but to the thousands of boat and vessel owners in the United States of America from the United States Lines down to the owner of the 18-foot cabin cruiser "MERRIE MISS". As noted by Messrs. Gilmore and Black in their treatise on *The Law of Admiralty*, Foundation Press, Inc., 1957, page 56:

> "By far the greatest number of claims for marine loss . . . arise under this clause [Perils]."

The interpretation given to the phrase by the Court of Appeals for the Second Circuit in the present case, if inequitable and contrary to underwriters' intentions, as is the case, cannot easily be overcome by subsequent policy modifications. If it were possible to do so this writ would not be sought. The phrase "perils of the seas" dates back to the earliest policy issued at Lloyds Coffee House. The policy on the "MAYFLOWER", insured by underwriters at Lloyds, insured against

perils of the seas as well as other related and customary perils.

The phrase "perils of the seas" is an ancient phrase the meaning of which has from time to time been considered by various courts in this country and in England. In the United States this Court has done so in two leading opinions.[1] A host of inferior courts have followed the principles laid down therein.[2] Underwriters have calculated premiums and paid losses in accordance with such principles. Any change in the ground rules in this respect should be made by this Court and not by the Court of Appeals for the Second Circuit—particularly when that Court is in conflict with the United States Court of Appeals for the Fifth Circuit.

Finally, petitioner, admittedly for the first time in the Court of Appeals, called to the attention of that Court a provision of the policy reading as follows:

> "The Assured further agrees that it shall be a condition precedent to any right of action or suit under this policy that the Assured submit to the Insurers proof of loss which shall show not only (a) that the vessel was seaworthy, *and that the Assured has used due diligence to prevent such loss or damage;* (b) . . . ." (Emphasis added) (10a).

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[1] *Compania de Navegacion Interior, S.A. v. Firemen's Fund Insurance Company*, 277 U.S. 66; *Hazard's Administrator v. New England Marine Ins. Co.*, 33 U.S. 557.

[2] The *Rappahannock*, 184 Fed. 291; *Ceballos v. Warren Adams*, 74 Fed. 413; *Western Assurance Co. of Toronto v. Shaw*, 11 Fed. 2d 495 (3 Cir.); *Continental Ins. Co. v. Patton-Tully Transp. Co.*, 212 Fed. 2d 543 (5 Cir.); *The Giulia*, 218 Fed. 744 (2 Cir.); *The Rosalia*, 264 Fed. 285 (2 Cir.).

Petitioner urged that based upon the findings of fact made by the District Court and adopted by the Court of Appeals a recovery under the policy was precluded by the above clause. The Court of Appeals rejected this argument on the untenable ground that the due diligence of the assured referred to in the above clause was "obviously that diligence required by the 'Inchmaree' and 'Perils' clauses" (78a).

Failure on the part of the assured to exercise due diligence to prevent a loss is not a defense to a claim under the Perils Clause of the policy. There is no such requirement incorporated in the said clause, nor is one implied as a matter of law (38 *Corpus Juris*, Sec. 304).

The due diligence proviso of the Inchmaree Clause at issue only excludes from the cover afforded by the said clause a loss caused by the failure of an owner or manager to exercise due diligence and not such failure on the part of an assured (27a). The requirement that an assured must show that he has used due diligence to prevent the loss or damage is clearly exclusive of its counterpart in the Inchmaree Clause. The Court of Appeals in effect has held that when an owner or manager of a vessel is an assured under the policy the requirement that due diligence by such assured must be shown is superfluous and only the due diligence requirement of the Inchmaree Clause is applicable. In many cases a manager of a vessel will not be named as an assured in the policy. Similarly, it is conceivable that an owner would not be so named in cases where the vessel is demise charterer. Accordingly, the Court of Appeals was clearly in error when it found that the due diligence of the

assured to which the proof of loss provision above referred was obviously the same due diligence required by the Inchmaree and Perils Clauses.

WHEREFORE, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination on a date certain to be therein named, a full and complete transcript of the record and all proceedings of the case entitled on its docket No. 27881, "*Allen N. Spooner & Son, Inc., Libelant-Appellant*, against *The Connecticut Fire Insurance Company, Respondent-Appellee*"; and that the said decree of the United States Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem meet and just.

Dated: New York, N. Y., June 5, 1963.

Respectfully submitted,

THE CONNECTICUT FIRE INSURANCE COMPANY,
Petitioner,

By LEONARD J. MATTESON,
Counsel for Petitioner.

Opinion of Levet, *D. J.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Tr. pp. 717-752)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

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LEVET, *D.J.*

The libellant in this suit in admiralty seeks to recover upon a marine hull insurance policy issued by respondent. The libellant claims this policy covered damage sustained in loss of libellant's Pulling Machine No. 12 (hereinafter "No. 12") on July 24, 1958, allegedly due to accidental damage on July 24, 1958.

At the time of the accident, when a port guy wire parted and a 75 foot tall leader collapsed, the No. 12 was under a bareboat charter to R. W. Stasch & Company and was being used in salvaging the sunken tanker, Empress Bay, which was located about in the center of the East River between the Manhattan and Brooklyn Bridges.

As a result of the accident, the No. 12 was declared a constructive total loss, since cost of repairs exceeded the insured value of $35,000. The parties have stipulated that in the event of liability, libellant may recover from respondent $32,020 with statutory interest from July 24, 1958. The difference represents a deductible amount of $480 and the value of the hulk after the accident of $2,500.

The issues under the policy are whether the loss of the barge (No. 12) was occasioned by a peril insured against under the policy and whether the loss of the barge resulted from a want of due diligence by the owner of said barge.

The proposed findings of fact, conclusions of law and briefs of the parties having been received, the Court, after considering the pleadings, evidence, exhibits, briefs and stipulations of the parties, now makes and files herein its Findings of Fact and Conclusions of Law, separately stated.

Findings of Fact

1. Libellant is a corporation duly organized and existing under and by virtue of the laws of the State of New York and with an office for the transaction of business at 143 Liberty Street, Borough of Manhattan, City, County and State of New York.

2. At all times hereinafter mentioned, at the commencement of this suit, the respondent, The Connecticut Fire Insurance Company, was and now is a corporation organized

and existing under and by virtue of the laws of the State of Connecticut and was and is engaged in the business of marine insurance, with an office for the transaction of said business within this district at 99 John Street, Borough of Manhattan, City, County and State of New York, and within the jurisdiction of this court.

3. At all times hereinafter mentioned, libellant was the owner of crane barge Pulling Machine No. 12 and prior to the accident hereinafter described said No. 12 was in all respect well found and seaworthy.

4. The No. 12 was a floating derrick, the lifting machinery having been mounted on a wooden barge 139 feet long and 38 feet wide. The tower, or leader frame, was approximately 75 feet high rising almost vertically from the center of the forward end of the barge. The lifting block and cables extended down from the top of the leader frame which was fixed or stationery, being supported by guy wires and steel beams. The hoisting engine was located at the other end of the barge in a small cabin. (Lib. Exs. 3 and 4; SM 46) The No. 12 was capable of lifting 400 tons. (SM 47; Lib. Ex. 12, pp. 27-28)

5. Libellant, on July 15, 1958, entered into a bareboat charter with R. W. Stasch & Company for the No. 12 to be used for salvage of the Empress Bay in the East River, New York, N.Y. It further provided that the lessee covenanted and agreed to—

> "Return the equipment in the same condition as when received, allowance being made for reasonable usage. Any breakage, damage, or loss to be renewed or replaced to the satisfaction of the Lessor."

6. In June 1958 libellant agreed to rent the No. 12 to R. W. Stasch & Company to be used in raising the sunken

tanker, Empress Bay lying in about 60 feet of water in the East River about mid-channel between Brooklyn and Manhattan Bridges. (SM 15, 131, 291). Libellant notified respondent through Carpinter & Baker that it was going to rent the No. 12 to R. W. Stasch & Company to be used in raising the Empress Bay and respondent agreed to this arrangement. At the same time libellant asked that the value of the No. 12 be increased (SM 17-18, 20, 21, 256-257, 265, 274).

7. On July 24, 1958, while engaged, in collaboration with certain other craft, all under the control and direction of one Richard W. Stasch of R. W. Stasch & Company, in salvage operations in the East River in New York City in connection with the sunken vessel, Empress Bay, one of the guy wires supporting the lifting crane of the No. 12 parted. As a result, the crane collapsed, was lost over the side, doing severe damage to the hull of the No. 12, which became a constructive total loss.

8. On or about January 7, 1957, respondent executed marine insurance policy No. H231-158 covering various vessels owned by libellant, including the No. 12, valued under the policy at $34,000. Thereafter, on or about December 31, 1957, in consideration of an agreed premium which has been duly paid by the libellant, said policy was renewed with attachments and endorsements extending the term of insurance to December 31, 1958. On or about July 18, 1958, in consideration of an agreed additional premium which has also been duly paid by libellant, the stated value of the No. 12 was increased to $35,000. At the time of the accident marine policy H231-158, issued by respondent, was in full force and effect (SM 4-5).

9. The policy contains a so-called "Perils" clause, which is as follows:

> "Touching the adventures and perils which we the said Insurers, are contended to bear and take upon us, they are of the Harbors, Bays, Sounds, Seas and other waters as above named, and Fire, it being the intent of these Insurers to indemnify the Assured for these Insurers' proportion of General Average and or Salvage Charges and or loss, damage, detriment or hurt to the said vessel arising from perils aforementioned for which these Insurers may be liable under this policy; it is a condition precedent, however, to any liability under this policy, that the Assured establish that any claim, whether for general average charges, salvage expenses or loss, damage, detriment or hurt to said vessel, has been directly caused by a peril insured against as aforesaid, and that the Assured further establish that such general average charges, salvage expenses or loss, damage, detriment or hurt has not arisen from or been caused by, either directly or indirectly, any of the following or other excluded causes, namely: incompetency of the master or insufficiency of the crew, or want of ordinary care in loading or unloading, stowing or broaching the cargo of the vessel; rottenness, inherent defects, or other unseaworthiness; theft, barratry, or robbery. It is further mutually agreed that this policy does not cover bursting or explosion of boilers, collapsing of flues or injury, derangement or breakage of machinery and for any expense in consequence thereof or any loss of or damage to any such part, and or to any other parts of the vessel directly or indirectly resulting from such occurrences, unless the Assured shall establish that such occurrences

were caused solely by sinking, stranding, collision with another vessel or burning. No loss is to be paid when such loss arises from failure to keep the vessel well pumped out." (Lib. Ex. 1)

The policy also contains the so-called "Inchmaree" clause, which is as follows:

> "This insurance also specially to cover (subject to the average and all other conditions of this policy not conflicting herewith) loss of or damage to hull or machinery through the negligence of master, mariners, engineers or pilots, or through bursting or explosion of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager, but free from any claim for the part in which latent defect existed." (Lib. Ex. 1)

10. On July 15, 1958, libellant entered into a written contract with R. W. Stasch & Company under which libellant bareboat chartered the No. 12 for the salvage operation (Lib. Ex. 6; SM 18). Libellant promptly notified respondent through Carpinter & Baker that the charter agreement had been signed and requested that R. W. Stasch & Company be included as a named assured during the period of the charter, which respondent agreed to do. At that time it was also agreed by libellant and respondent that the valuation of the No. 12 be increased to $35,000. These agreements were embodied in an endorsement to the insurance policy executed by respondent (Lib. Ex. 2; SM 2-3, 7, 18-19, 260, 263; Ans. paragraph Fourth).

11. The No. 12 was delivered to R. W. Stasch & Company at Pier 31 in the East River on July 18, 1958 (SM 33, 54-55). The No. 12, including her hoisting equipment, cables, guy wires and machinery, was at this time and on July 23, 1958, prior to the accident, in good condition and seaworthy (Lib. Ex. 8; SM 25, 34).

12. Richard W. Stasch of R. W. Stasch & Company was familiar with the No. 12, having used it to lift a sunken dredge in another salvage operation about a year previously (Resp. response to Request for Admissions, dated March 31, 1960; Lib. Ex. 12, p. 5; SM 10-12, 16, 49).

13. Under a contract between R. W. Stasch & Company and the United States, Stasch was to remove the sunken Empress Bay from the bottom of the East River. Various craft, all under the direction of Richard W. Stasch, were attempting to perform the contract. These craft included Stasch's crane or barge No. 336; the Spooner No. 12, chartered by Spooner to R. W. Stasch & Company; the Red Star tug, Roslyn; the derrick, Reggie, a smaller crane barge; two boats belonging to Gates; two small Dravo tugs, and another little boat with which to go ashore (Ex. 12, p. 9). Three vessels, the No. 12, the No. 336 and the Reggie, were lashed together, with the No. 336 between the No. 12 and the derrick Reggie.

14. On July 23, 1958, the No. 12 was towed to the scene of the operation and positioned over the Empress Bay, her lifting block being made fast to one end of several wire slings which had been previously placed under the stern of the wreck (Lib. Ex. 7; SM 34, 35-37, 223). Lifting barge No. 336, owned by R. W. Stasch & Company, was made fast to the other end of the slings at the stern of the wreck

(Lib. Ex. 7; SM 35-37, 60, 223). The hoisting tackle of derrick Reggie, also bareboat chartered by R. W. Stasch & Company, was attached to the bow of the Empress Bay (Lib. Ex. 7; SM 223). The three lifting units were secured together with the No. 336 in the center and facing downstream, the No. 12 on the Brooklyn side also heading generally downstream, and the Reggie on the Manhattan side heading upstream (Lib. Ex. 7; SM 55, 59-60, 119, 222, 312, 314; Lib. Ex. 12, pp. 7-8).

15. On the afternoon of July 24, 1958, preparations were made to begin the operation, the plan being to lift the Empress Bay off the bottom and pull her over to shallow water along the Brooklyn shore in the vicinity of Brooklyn Bridge (SM 61, 67; Lib. Ex. 12, p. 12). The weather was partly cloudy, good visibility, light southerly wind. The water was calm, the tide was ebbing at 3.1 knots (Resp. Ex. D; SM 6, 109, 184). Richard W. Stasch was in charge of the operation and was positioned on the bow of the No. 12 transmitting orders by a power microphone (SM 38, 52, 223, 317; Lib. Ex. 12, p. 10). Note that Stasch went back and forth between the bow of the No. 336 and the No. 12 (SM 224). Karl Carlsson, a yard mechanic and hoisting engineer, was on board the No. 12 at the salvage operation on the day of the accident to operate the hoisting machinery. He took his orders from Stasch, who paid his salary (SM 32, 38).

15A. Richard W. Stasch was doing business under the name of R. W. Stasch & Company (Stipulation dated June 29, 1962). The above stipulation was in response to the court's request for additional facts in order to determine the relationship of Richard W. Stasch to R. W. Stasch & Company. The record was not clear as to what this relationship was (SM 20).

16. The tug Roslyn, owned and operated by Red Star Towing & Transportation Company, was engaged by Stasch to do the pulling (SM 97-98). The stern of the Roslyn was made fast to the Empress Bay by a nylon hawser about 200 feet long (SM 41, 61, 62, 66, 101, 102, 137, 226, 227, 238, 245a). About 5:00 P. M. upon signal from Stasch, the No. 12, along with the No. 336 began gradually to lift (SM 38-39, 64, 225; Lib. Ex. 12, p. 11). After a period of slow lifting, Stasch ordered the No. 12 and the No. 336 to stop (SM 39-40, 226). The No. 12 was then under a load of approximately 250 tons (SM 41, 47, 64; Lib. Ex. 12, pp. 19, 27).

17. At Stasch's instructions, the tug Roslyn had positioned herself down river from the lifting units heading toward the Brooklyn shore in the area of Brooklyn Bridge (SM 91, 92, 101-102, 104, 106, 116, 227; Lib. Ex. 12, p. 12). Upon stopping the lift, Stasch ordered tug Roslyn to go ahead slowly on her engine (Lib. Ex. 12, p. 12; SM 41, 66-67, 103, 226). Stasch then ordered the Roslyn to increase her revolutions slowly until she was under full power (SM 104-106). Throughout the time the tug was pulling, she remained headed in the same direction and made no turns (SM 92, 106, 227; Lib. Ex. 12, pp. 21-22). The tug Roslyn carried out all orders given to her by Stasch (SM 106).

18. While the salvage operation was so proceeding, about 6:05 P. M. the forward port guy wire of the No. 12 parted, resulting in the leader frame's falling over to starboard onto the deck of the No. 336 (SM 5, 45-47, 167, 185, 221, 227, 313-314; Lib. Ex. 12, pp. 13-14). The tug Roslyn had been pulling about 20 to 30 minutes before the accident occurred (SM 79, 80, 92, 110, 228; Lib. Ex. 12,

pp. 14, 21, 22). The sunken tanker Empress Bay was not moved as a result but remained just where she was before the tug started pulling (Lib. Ex. 12, p. 23; SM 110, 239-240).

19. No proof has been adduced to show that any acts or failure to act on the part of the tug Roslyn, its operators, or on the part of Stasch insofar as his control or direction of said tug, caused or contributed to the accident affecting the No. 12. The tug remained headed in the same direction during the pulling. The Roslyn did not cause the accident and was not negligent.

20. Although the No. 12 was equipped with side slings, Stasch did not use these during the salvage operation (SM 27, 28, 50). The purpose of side slings is to steady the lifting load, centering the hoisting cables at deck level so as to avoid the pendulum effect of a heavy load suspended from the top of the leader frame almost 85 feet above water (SM 162-164, 232). Side slings are commonly used to control a "hoist load" and have been used in marine salvage operations (SM 164, 165, 232). Without the use of side slings, the No. 12 could tilt approximately 3 degrees or slightly above 3 degrees to starboard before the port guy wire would be exposed to a breaking stress of 98,500 pounds (Lib. Ex. 10; SM 156).

21. Various Coast Guard vessels were in control or attempted control of river traffic and certain New York City fireboats were nearby in the event of any fire emergency. However, the Coast Guard blockage was not completely effective (Lib. Ex. 12, pp. 14-15; SM 191-193).

22. I find that the failure to use the above-mentioned slings (Finding of Fact No. 20) constitutes a want of due

diligence on the part of Stasch. I conclude that Stasch was negligent and that such negligence resulted in the accident that occurred herein.

23. As a result of this accident, the No. 12 was severely damaged and upon survey was declared a constructive total loss (SM 5). It is stipulated that after deducting scrap value and a deductible amount of $480.00, libellant's provable damage is $32,020.00 with statutory interest from July 24, 1958. (SM 6).

24. Libellant has shown by a fair preponderance of the credible testimony that a large vessel sufficient to create a substantial swell passed the neighborhood of the No. 12 at or just before the accident.

Discussion (Finding No. 24)

Four of libellant's witnesses testified that a large freighter came down the river:

Edward Jadro, employed by Stasch, who was on the tug Dravo-50, said it was a black freighter, a little smaller than a Liberty Ship, about 8,000 tons.

Fred Alcorn, an operating engineer employed by Stasch, testified to similar effect.

Frederick Miller, captain of the tug Roslyn, testified to like effect.

Karl Carlsson, a Spooner employee on the No. 12, testified that just before the accident a freighter, black with some red trimming on it, was going downstream.

A summary of the testimony of these witnesses follows.

Edward Jadro, employed by Stasch and who was on the tug Dravo 50, testified for the libellant.

The Dravo-50 was ordered to slip downstream to stop the vessels going upstream from coming suddenly upon the salvage operation (SM 181, 182). The tug was about

1,000 feet south of the derricks (SM 182), headed upstream (SM 183).

Jadro, captain, was in the pilot house (SM 183). Before this accident there were many boats passing up and down (SM 184).

In the period of 20 minutes before the accident there were many small boats and a freighter ship coming down the river (SM 185, 186). He saw the freighter coming down favoring the Manhattan shore, passing about 200 feet away from the Dravo-50. There was a ground swell of a foot or a foot and a half "like a roller" (SM 186). The evidence of an accident on the No. 12 came about a minute or so after the freighter passed the Dravo-50. It was moving 4 to 5 miles per hour (SM 187).

At least four 40-foot Coast Guard boats were present. One Coast Guard cutter was also present (SM 189). One excursion boat went up the river during the hoisting operations (SM 193). The Coast Guard boats made swells (SM 194, 196).

He saw the freighter up river about 5 minutes before the accident (SM 206, 208). It was a black freighter, a little smaller than a Liberty Ship, about 8,000 tons (SM 211), about 400-500 feet long, going about 4 or 5 miles per hour. He noticed no stack markings (SM 212). The swell was a little over a foot (SM 213).

Fred Alcorn was an operating engineer employed by R. W. Stasch & Company on the barge Reggie, an A-frame hoist.

Alcorn said that between the time Stasch ordered the tug to go ahead until the time of the accident there were a few little boats in traffic and a large freighter backed out of a pier upstream a few piers above the Manhattan Bridge and came downstream on the Manhattan side of the Reggie some 200-300 feet away (SM 228, 229). Ten to 12 minutes elapsed between the time Alcorn saw

the freighter and the time of the accident, and about 2 minutes between the time the vessel passed the Reggie and the time of the accident. He felt a rocking motion on the Reggie after the freighter passed (SM 230). There were fireboats and Coast Guard boats on the stream (SM 231). Alcorn said it was a large freighter, 400-500 feet, perhaps a little larger than a Liberty Ship, going about 5 miles an hour (SM 250). A couple of minutes after it passed, swells occurred and the swells coincided with the accident. The swells rocked the Reggie but he did not notice if they rocked the No. 12. They looked like two-foot waves (SM 252-253).

Frederick Miller, Captain of the tug Roslyn.

Miller, Captain of the tug Roslyn, saw a freighter of about 10,000 tons coming down the East River on the Manhattan side of the river (SM 107-108). There was a little swell (SM 108), but, generally, the water was calm (SM 109). There were also Coast Guard picket boats and fireboats. These boats were creating seas or a swell (SM 109). Miller did not recall the color of the freighter, but it was about the same size or bigger than a Liberty Ship (SM 121). She passed about 500 feet away, but Miller did not see her name or stack marking. There were 2 foot swells as the vessel went by (SM 124). The small boats were kicking up one or two foot swells around him (SM 127). It was a clear day; very little wind; the surface of the water was flat (SM 135-136).

Miller's testimony concerning positions of the freighter in relation to the period of time that the Roslyn was pulling is not clear (SM 121-124).

Karl Carlsson, a Spooner employee on the No. 12, testified.

When the hoist was operating just before the accident, a "big ship," a freighter, was going downstream. It was black with some red trimming on it, about 400-500 feet

long (SM 41, 42, 43). There were swells and a little motion on the No. 12 (SM 45); the tug boat pulled (SM 71) and the guy cables started to part and the leader fell over (SM 45, 46) and it hit the No. 336 (SM 47).

It is true that there is some discrepancy in the foregoing testimony as to when the freighter came downstream. On the other hand, there is some degree of consistency:

(1) Jadro, on the tug Dravo-50, placed the passing of the freighter a minute or so before the accident.

(2) Alcorn, on the Reggie, said a couple of minutes after the freighter passed swells occurred and the swells coincided with the accident.

(3) Carlsson, on the No. 12, testified that just before the accident the freighter passed downstream.

A number of observers testified that no large freighter passed or that little, if any, traffic passed at that time. These witnesses included:

Axel J. Pederson, a pilot employed by the New York City Fire Department.

John J. Gumbrecht, a fireman, first grade, on fireboat tender, Smoke.

John E. Gibbons of the United States Army Engineers said that water was calm and there "wasn't any rough seas."

Richard D. Folkman of the crew of the Coast Guard cutter Manitou.

Fred L. Crouch, a Stasch employee on the No. 336, said he did not remember any big ships at all.

According to Folkman, at 1740 (5:40 P. M.) down river traffic was stopped and two-way traffic was not permitted until 1830 (6:30 P. M.). However, it is questionable if the restriction was absolutely enforced.

A summary of the testimony of such witnesses follows.

Axel J. Pedersen, a pilot employed by the New York City Fire Department, testified for respondent.

He was a fireman assigned to fireboat tender Smoke II (SM 286). He saw no large freighter on the river (SM 294). He saw no large freighter passing at the time of the accident (SM 298) or any swells in the water (SM 301).

John J. Gumbrecht, a fireman, first grade, on the fireboat tender Smoke, testified for the respondent (SM 276).

His tender, the Smoke, was in the river as standby to two fireboats (SM 277). At about the time of the accident, his boat was relieving the crew of the Firefighter, which was tied up under the Brooklyn Bridge. The Smoke came up the East River from the quarters of the Firefighter (SM 279). About 5-10 minutes after the Smoke arrived at the tied-up Firefighter, the accident came to his attention and he saw the crane topple over (SM 280, 281).

Gumbrecht did not remember passing any traffic in the river. He saw no large vessel going down the river (SM 282, 283). He noticed no swells around the water (SM 284). When he arrived the water was calm (SM 285).

Edward J. Byrnes, a Lieutenant aboard the fireboat McKean, testified for respondent.

The fireboat McKean was assigned to combat any fire that might develop in the salvage operations. The McKean was on the Manhattan side (SM 324, 325). He was observing the activities of the contractor at the time of the accident (SM 326). During the period he observed the tug putting on the strain (SM 327), he saw no traffic at all coming down the river (SM 328). The surface of the river was normal (SM 330), with nothing unusual (SM 331). There was no commercial traffic, no sightseeing boats or tugs or tows. He said: "I am saying definitely that nothing passed by." (SM 353)

John E. Gibbons of the United States Army Engineers, Chief of the Contract Inspection Section and Supervisory Construction Inspector, testified for respondent.

He was to supervise the inspection of the removal of the Empress Bay from the East River. The contract for removal of the Empress Bay was between R. W. Stasch & Company and the government (SM 310-311). On the day of the accident, Gibbons was on the Reggie (SM 312). He was there as an observer only. The accident was at about 6:05 P. M. (SM 313). At that time the water was calm. There "wasn't any rough seas" except some ripples caused by the wind or the backwash from the tug (Roslyn) (SM 314, 315).

Richard D. Folkman, who was a member of the crew of the Coast Guard cutter Manitou, testified by deposition for the respondent (Resp. Ex. G).

The Manitou was ordered to direct certain traffic control on the East River at the time of the salvage operation. At 1645, eastbound or up river traffic was stopped and westbound or down river traffic was moved (p. 5). At 1740 the process was reversed. At 1830 orders were received to permit two-way traffic on the river. When traffic was permitted, it was permitted to pass at slow-as-possible speed (p. 6). At 1759, the cutter Sauk reported to the Manitou that a derrick rig on the barge had collapsed (p. 7).

Water conditions on the log were listed as zero, which indicates no swell, which would be a calm or slight sea, and in this case, it would be a calm sea (pp. 9, 10). The witness conceded that the Manitou could not have stopped eastbound or up river traffic because the cutter was on the eastern side of the accident (p. 12). The Sauk, however, was in the immediate area of the accident (p. 13).

Fred L. Crouch, a rigger employee of Stasch in July 1958, testified by deposition for the libellant (Lib. Ex. 12).

Although there was traffic on the river, Crouch said: "I

wouldn't say nothing big went up or down her." He added: "I wouldn't say there wasn't any, and I wouldn't say there was, but that day I don't remember" (p. 15).

There were black balls up the rigging on the Reggie, indicating that all traffic was supposed to slow down. But a lot of the traffic didn't slow down (p. 16). He stated: "I don't remember any big ships at all" (p. 24). He did not recall any Coast Guard vessel causing any swells at the time of the accident (p. 29). As far as he remembered, the only boat that was running around him at the time of the accident was the fireboat (p. 31).

25. The extent of the actual observation by this latter group of witnesses is, in my belief, limited. The passage of the down-bound freighter, although perhaps not established beyond a reasonable doubt, is proved, I find, by a fair preponderance of the credible testimony. The negative testimony of the above-mentioned witnesses does not prevail over the affirmative testimony of those who testified that they saw the freighter under the facts and circumstances hereunder (See The Fin MacCool, 2 Cir. 1906, 147 Fed. 123, 127).

26. I find that the libellant has shown by a fair preponderance of the evidence that swells were a culminating factor in causing the accident to the Spooner No. 12.

Discussion (Finding No. 26)

Jadro, on the Dravo-50, said the swells were a little over a foot.

Alcorn, on the Reggie, said the swells, "looked like two foot waves."

Miller, on the tug Roslyn, said that there were two-foot swells, although he also said that there was very little wind and that the surface of the water was flat.

Carlsson, on the No. 12, said there were swells and a little motion on the No. 12.

There is no doubt that the forward port guy wire, a 1⅜" steel rope, parted and that as a result the leader frame on the No. 12 fell. A portion of the best remaining piece of this guy wire was sent to Columbia University and subjected to a strength test, and it was ruptured at 98,500 pounds or 49.25 tons. The expert, Professor Thurston, conceded that what this rope would have withstood in the way of tensile strength in a sound condition he could not say. He also conceded that if the wire, regardless of condition, had been subjected to a full load instantaneously, it would part under substantial stress. Obviously, this condition is physically impossible. Whatever it was, it appears that the forward guy wire was subjected to its breaking stress.

Emanuel Silkiss, a metallurgical engineer employed by Lucius Pitkin, Inc., metallurgical consultants and chemists, testified for respondent.

Mr. Silkiss said that the testing machine used by Professor Thurston was not an accurate measurement of what the wire rope tested by Thurston would have sustained in perfectly whole condition (SM 359-360). If there had been no ruptured wires, if the six strands were perfectly normal, it would have sustained a higher load (SM 360-362). This was based upon a slow, steady pull of the rope. In regard to the ability of a rope to withstand a sudden application of pressure and a release of pressure, Silkiss testified that "under any condition a sudden application of load would cause the rope to break at a lower strain." Thus, if this rope had been in a perfectly sound condition it would not have withstood a higher load suddenly applied (SM 364).

Glen M. Wiley of Havre de Grace Shipyard, Inc., builder of large cranes, derricks and barges, testified for libellant

that it would take about a three degree tilt of the No. 12 to subject the port guy wire to a breaking stress of 98,500 pounds (SM 161-162). This, he said, could be prevented by the use of slings (SM 162-165). Wiley also gave his opinion that a 1⅛" steel cable which was capable of withstanding a load of 98,500 pounds was adequate for an operation requiring a lifting of 250 tons but that if it were capable of withstanding only a breaking load of 49,250 pounds it would be inadequate (SM 166, 167).

Wiley also conceded that a settling back of the Empress Bay could have caused a much greater strain momentarily and caused the guy wire to go. If the barge (No. 12) moved sidewise, it could throw a very unusual strain on the barge and the cable might break (SM 173). These things could cause the breaking even with slings (SM 174).

Wiley said the raising and settling was a "pretty far fetched idea" (SM 175). The second possibility (the movement sidewise of the No. 12) seems to have been eliminated throughout the time the tug was pulling for the tug remained headed in the same direction and made no turns (SM 92, 106, 227; Lib. Ex. 12, pp. 21-22).

27. Thus, the tilting beyond the angle which the tensile strength of the cable could withstand resulted in the accident.

28. I find that, due to the fact that Stasch had negligently failed to use available side slings, the tilt of the No. 12, caused by waves or swells from the aforesaid freighter, caused the forward port guy wire on the No. 12 to break. I find no evidence of any other cause.

29. On October 3, 1958, respondent denied liability in this matter (Libel, ex. 5). Libellant brought suit and a libel was filed in this court on December 30, 1958.

Opinion of Leavy, D.J.

DISCUSSION (Law)

Swells

I find that the swells herein are not within the coverage under the "perils" clause of the policy here involved.

Damage from swells from passing ships is not within the insurance term "perils of the sea." Western Assur. Company v. Shaw, 3 Cir. 1926, 11 F. 2d 495; Continental Ins. Co. v. Patton-Tully Transp. Co., 5 Cir. 1954, 212 F. 2d 543. See also The Giulia, 2 Cir. 1914, 218 Fed. 744; The Rosalie, 2 Cir. 1920, 264 Fed. 285; Duche v. Thomas and John Brocklebank, 2 Cir. 1930, 40 F. 2d 418; Hecht, Levis & Kahn, Inc. v. New Zealand Ins. Co., 2 Cir. 1941, 121 F. 2d 442.

The Western Assur. Company case, supra, is directly in point. There, Davis, Circuit Court Judge, wrote in part:

> "'Perils of the sea' against which underwriters insure are confined to extraordinary occurrences, such as stress of weather, winds and waves, lightning, tempests, rocks, etc. Hazard v. Insurance Co., 33 U. S. (8 Pet.) 557, 584, 8 L. Ed. 1043. If a loss arises from the ordinary circumstances or wear and tear of a voyage, the insurer is not liable because a seaworthy vessel is supposed to endure usual and customary occurrences. The words are therefore used to describe abnormal causes and extraordinary circumstances. Coles v. Insurance Co., 6 Fed. Cas. No. 2988, page 65; Moores v. Louisville Underwriters (C.C.) 14 F. 226; Nord-Deutscher Lloyd v. President, etc., of North America, 110 F. 420, 49 C.C.A. 1.
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>
> * * * The passing of steamers along the Delaware between the port of Philadelphia and the sea is a normal occurrence that may be expected at any time. It was not extraordinary or unusual. It does

not seem to us that waves from a passing steamer washing against the shores of the Delaware are a 'peril of the sea' against which the barge was insured. * * *" (p. 496)

In Continental Ins. Co., supra, the court, in discussing whether waves from a passing towboat was a "peril of the river," pointed out:

"* * * If it be assumed that the waves from a passing towboat did cause and not as we think merely accelerate the sinking, the further question arises: Was it a 'peril of the river' within the meaning of the policy? Was it an extraordinary, abnormal occurrence against which the insureds could not protect themselves with ordinary precaution? Or was it a normal, customary circumstance that may occur every day? The passing of towboats along the Mississippi at the points in question is a normal occurrence that may be expected at any time. It was not extraordinary or unusual and according to Smoot he met and passed big towboats every day. It does not seem to us that displacement waves from a passing towboat are a 'peril of the river' against which the barge was insured. Western Assurance Company v. Shaw, 3 Cir., 11 F. 2d 495." (p. 547)

In The Giulia, supra, Circuit Judge Rogers said:

"* * * Perils of the seas are understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence. * * *" (p. 746)

Opinion of Levet, D.J.

In The Rosalie, supra, Circuit Judge Hough stated:

> "The decisions of this court already contain two accepted definitions of the phrase 'peril of the sea.' The Warren Adams, 74 Fed. 415, 20 C.C.A. 486; The Giulia, 218 Fed. 746, 134 C.C.A. 422. They need not be repeated, further than to insist that the peril which forms a good exception in a bill of lading means something so catastrophic as to triumph over those safeguards by which skillful and vigilant seamen usually bring ship and cargo to port in safety." (p. 288)

In the Duche case, supra, Circuit Judge Chase, after quoting the definition found in The Giulia, supra, well said:

> "* * * A multiplication of definitions will result only in a multiplication of words without serving any useful purpose. The difficult task is not to define in general terms a peril of the sea, but to determine whether some established facts and circumstances, like those proved in this case, fall within a sound definition. * * *" (p. 420)

The Hecht case, supra, was an action upon a policy of marine insurance and the court pointed out that the phrase "peril of the sea" has the same meaning when used in a marine policy as when used in a bill of lading (p. 442).

It is clear that the swells here involved are not "perils of the sea." The swells were not an extraordinary occurrence. They did not arise from an irresistible force or overwhelming power, which could not be guarded against by the ordinary exertions of human skill and prudence. In effect, a "peril of the sea" situation does not exist in this case.

It has been well stated that "Where the same words have for many years received a judicial construction it is not unreasonable to suppose that parties have contracted upon the belief that their words will be understood in what I will call the accepted sense." (Lord Halsbury in *The Thames and Mersey Marine Insurance Company, Limited* v. *Hamilton, Fraser & Co.* [1887], 12 App. Cas. 484, 490).

Cases cited by libellant do not appear to be in point. *Compania De Navegacion* v. *Ins. Co.*, 1928, 277 U. S. 66, involved marine insurance on a small vessel, constructed as a tug on inland waters which was insured for a voyage in tow over the open sea, under policies exacting extra-heavy premiums. It was held that the "perils of the sea" against which the vessel was insured included conditions of wind and water extremely dangerous in her case though not so to ordinary seagoing vessels. In reversing the Court of Appeals, Second Circuit, Chief Justice Taft wrote in part as follows:

> "* * * The view of the Circuit Court of Appeals that 'perils of the sea' has an absolute meaning and may not be varied by the knowledge of the parties as to the circumstances and must be maintained stiffly in favor of the insurance companies and against the insured, is not necessary or reasonable. The variation in the significance of 'seaworthy,' as shown by the above authorities, when caused by exceptional circumstances known to both parties, applies as well to the meaning of perils of the sea as to that of seaworthiness. The two terms in such cases are correlative terms. * * *" (p. 80)

The case at bar involves insurance of a vessel which was to be used in the East River. The Nos. 12 was cus-

tomarily used for the lifting of piles (SM 52-53). Certainly swells created by passing traffic in such waters as the East River are not exceptional circumstances.

Klein v. Globe & Rutgers Fire Ins. Co., 3 Cir. 1924, 2 F. 2d 137, involved swells, winds, and, above all, a log caught between the ship and a barge.

New York, New Haven & Hartford R. Co. v. *Gray*, 2 Cir. 1957, 240 F. 2d 460, concerned a carfloat into which water from a river leaked, causing listing and settling which, in turn, caused cars on the float with their cargo to slide into the river.

Compania T. Centro Americana, S. A. v. *Alliance Assur. Co.*, D. C. S. D. N. Y. 1943, 50 F. Supp. 986, related to a vessel into which there was an accidental incursion of sea water through an opening not intended for the purpose. Moreover, the determination was made under British decisions and statutes.

"INCHMAREE" CLAUSE[1]

In Finding of Fact No. 22 it was concluded that Stasch's actions constituted a want of due diligence on his part and that he was negligent. Richard W. Stasch was doing business under the name of R. W. Stasch & Company (Finding of Fact No. 15A); therefore, the acts of Richard W. Stasch are the acts of R. W. Stasch & Company. However, does the negligence or want of due diligence of R. W. Stasch & Company (i.e., Stasch) also result in a similar lack of due diligence by the owners of the vessel?

To determine this question, the effect of the charter party must be considered.

[1] With respect to the "Inchmaree" clause, its origin and application under the English decisions, see 2 Arnould, Marine Insurance and Average 886 (a) 13 ed. 1950

Title 46 USC § 186 is as follows:

"§ 186. Charterer may be deemed owner

"The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."

It would appear that under the above circumstances this section makes acts of the charterer in effect the acts of an owner. Petition of Republic of France, D. C. S. D. Tex. 1953, 121 F. Supp. 497, rev'd on other grounds, 5 Cir. 1961, 290 F. 2d 395; Scheffler v. Moran Towing & Transportation Co., D. C. E. D. N. Y. 1933, 4 F. Supp. 255, rev'd on other grounds, 2 Cir. 1933, 68 F. 2d 11; In re New York Dock Co., 2 Cir. 1932, 61 F. 2d 777; Stewart v. United States Shipping Board E. F. Corporation, D. C. E. D. N. Y. 1925, 7 F. 2d 676.

Generally speaking, therefore, under the conditions specified, a bareboat charterer has the rights of an owner. The Atlas No. 7, D. C. S. D. N. Y. 1930, 42 F. 2d 480; Tracy Towing Line v. City of Jersey City, D. C. D. N.J. 1952, 105 F. Supp. 910.

The so-called "Rental Contract" from Allen N. Spooner & Son, Inc. to R. W. Stasch & Company, dated July 15, 1958, is a bareboat charter of Pulling Machine No. 12 (See Lib. Ex. 6). "The demise, in practical effect and in important legal consequence, shifts the possession and control of the vessel from one person to another, just as the shore-side lease of real property shifts many of the incidents of ownership from lessor to lessee." Gilmore and Black,

The Law of Admiralty § 4-29 (1957). It is "an instrument for vesting in one person most of the incidents of ownership in a capital asset of that business [i.e., shipping]—the ship—while another retains the general ownership and the right of reversion." Gilmore and Black, op. cit. supra.

"The most important consequences of the distinction between the demise and the other forms of charters flow from the fact that the demise charterer is looked on as the owner of the vessel *pro hac vice*." Gilmore and Black, op. cit. supra at § 4-23. See Leary v. United States, 1872, 81 U. S. 607, 610; Reed v. United States, 1871, 78 U. S. 591, 601. "[H]e qualifies as the 'owner' for purposes of the statutes relating to limitation of liability; * * *. In general, all *in personam* liability arising out of the ship's operation are brought home to the demise charterer." Gilmore and Black, op. cit. supra. "The vessel, so far as third persons are concerned, is his vessel, and the men are his men; such of their defaults as are attributable to the owner and employer under *respondeat superior* doctrines are his to answer for." Gilmore and Black, op. cit. supra. See also The Barnstable, 1901, 181 U. S. 464.

It inevitably follows that the term "owner" in the "Inchmaree" clause (Lib. Ex. 1) here must refer to R. W. Stasch & Company (i.e., Richard W. Stasch), the charterer, which, in effect, by action of the libellant, has become the owner for purposes of operation and control and, hence, for responsibility, under the insurance contract. Certainly, it cannot be contended that libellant, by the rental contract above mentioned, can divest itself of the ownership responsibilities under the "Inchmaree" clause. Such a result would be unreasonable.

Consequently, since R. W. Stasch & Company lacked "due diligence," as a result of which the disaster came about, the "owner" clause operates to exempt the insurer from liability.

Since the court has not found the respondent liable under its policy for the loss claimed herein, a determination of the issue of subrogation is not necessary.

Respondent-insurer impleaded Red Star Towing & Transportation Company. This court granted a motion to dismiss the impleading petition. The Court of Appeals held that the order granting the motion was a non-appealable order and thus the Appeals Court had no jurisdiction to entertain it. Allen N. Spooner & Son, Inc. v. Connecticut Fire Ins. Co., 2 Cir. 1962, 297 F. 2d 609.

Conclusions of Law

1. This court has jurisdiction of the parties and of the subject matter of this action.

2. The swells which caused the tilt of Pulling Machine No. 12 and the resulting accident (in the absence of the slings aforementioned) are not within the coverage under the "perils" clause of the policy here involved.

3. (a) The lack of due diligence and negligence of Richard W. Stasch (R. W. Stasch & Company) permitted the swells to bring about the accident.

(b) Richard W. Stasch was doing business under the name of R. W. Stasch & Company; therefore, the acts of Richard W. Stasch are the acts of R. W. Stasch & Company.

(c) R. W. Stasch & Company (i.e., Richard W. Stasch), the charterer herein, is the owner of Pulling Machine No. 12 for the purposes of the "Inchmaree" clause.

(d) Because the loss herein resulted from a want of due diligence on the part of R. W. Stasch & Company (i.e.,

Richard W. Stasch), the owner of the No. 12 for the purposes of the "Inchmaree" clause, it follows that said clause operates to exempt the insurer from liability.

4. The respondent is not liable under its policy for the loss claimed herein.

5. The libel is dismissed with costs.

Submit final decree upon notice in accordance with the opinion herein.

Dated: New York, N. Y.
June 29, 1962.

RICHARD N. LEVET
United States District Judge.

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 239—October Term, 1962

(Argued February 1, 1963 Decided March 11, 1963)

Docket No. 27881

ALLEN N. SPOONER & SON, INC.,
Libelant-Appellant,

v.

THE CONNECTICUT FIRE INSURANCE CO.,
Respondent-Appellee.

Before:

LUMBARD, Chief Judge, SMITH AND HAYS, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Richard H. Levet, Judge, dismissing libelant's action on a policy of marine hull insurance.

Reversed.

KENNETH H. VOLK, of Burlingham, Underwood Barron, Wright & White, New York City (Hervey C. Allen of counsel) *for Libelant Appellant.*

SHELDON A. VOGEL, of Bigham, Englar, Jones & Houston, New York City (Joseph J. Magrath, 3d, of counsel) *for Respondent-Appellee.*

Opinion of Court of Appeals

HAYS, *Circuit Judge*:

This is an action on a policy of marine hull insurance. The district court held that the loss on which appellant sued was not within the coverage of the policy and dismissed the libel. We reverse and direct that judgment be entered for the libelant.

Appellant takes no exception to the district court's findings of fact and we accept those findings as supported by the evidence. We disagree with the district court's application of the law to the facts as found.

Libelant's claim arises out of the loss of its crane barge, called Pulling Machine No. 12, while the barge was bareboat chartered to Richard W. Stasch, doing business as R. W. Stasch & Company. Stasch chartered the barge for the purpose of raising the sunken tanker Empress Bay from the East River where it lay in about 60' of water approximately mid-channel between the Brooklyn and Manhattan bridges.

Pulling Machine No. 12 consisted of a tower, or leader frame, about 75 feet in height mounted on a wooden barge 139' long and 38' wide. At all times prior to the accident in question the barge was well found and seaworthy.

On July 24, 1958 Pulling Machine No. 12 was engaged in lifting the Empress Bay. It was operating under the direction of Stasch who took a position on the bow of the No. 12 and transmitted orders by microphone. While the vessel was so engaged one of the guy wires supporting the crane parted and the crane collapsed and was lost over the side. The hull of the barge was so severely damaged by the collapse of the crane that it was concededly a constructive total loss.

The parting of the guy wire which resulted in the collapse of the crane was caused by the tilting of the barge while the lifting operation was in progress. The tilting of the barge was caused by the swells from a large vessel

which passed the No. 12 just as it was engaged in the lifting operation.[1]

The loss of the crane could have been prevented by the use of side slings with which the No. 12 was equipped and which would have controlled the "hoist load" so that the guy wire would not have been subjected to the breaking stress. Stasch was negligent in failing to use the side slings.

The district court did not make clear whether, in its view, the proximate cause of the loss of the barge was the negligence of Stasch or the swells from the passing tanker, although it characterized the latter as "a culminating factor in causing the accident". It is not necessary for us to resolve the issue because in our view the insurance company is liable on its policy in either case.

The No. 12 was covered by a marine insurance policy issued by appellee, two clauses of which are here involved. The "Perils" clause provides:

> "Touching the adventures and perils which we, the said Insurers, are contented to bear and take upon us, they are of the Harbors, Bays, Sounds, Seas and other waters as above named, and Fire, it being the intent of these Insurers to indemnify the Assured for these Insurers' proportion of General Average and or Salvage Charges and or loss, damage, detriment or hurt to the said vessel arising from perils aforementioned for which these Insurers may be liable under this policy; it is a condition precedent, however, to any liability under this policy, that the Assured establish that any claim, whether for general average charges, salvage expenses or loss, damage, detriment or hurt to said vessel, has been

[1] Appellee disputes this finding as well as the finding that the tug used by Stasch for the lifting operation did not cause or contribute to the accident. On the basis of the evidence in the record we cannot say that these findings are clearly erroneous.

directly caused by a peril insured against as aforesaid, and that the Assured further establish that such general average charges, salvage expenses or loss, damage, detriment or hurt has not arisen from or been caused by, either directly or indirectly, any of the following or other excluded causes, namely: incompetency of the master or insufficiency of the crew, or want of ordinary care in loading or unloading, stowing or broaching the cargo of the vessel; rottenness, inherent defects, or other unseaworthiness, theft, barratry, or robbery. It is further mutually agreed that this policy does not cover bursting or exploding of boilers, collapsing of flues or injury, derangement or breakage of machinery and or any expense in consequence thereof or any loss of or damage to any such parts and or to any other parts of the vessel directly or indirectly resulting from such occurrences, unless the Assured shall establish that such occurrences were caused solely by sinking, stranding, collision with another vessel or burning. No loss is to be paid when such loss arises from failure to keep the vessel well pumped off."

The "Inchmaree" clause provides:

"This insurance also specially to cover (subject to the average and all other conditions of this policy not conflicting herewith) loss of or damage to hull or machinery through the negligence of masters, mariners, engineers or pilots, or through bursting or explosion of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager, but free from any claim for the part in which latent defect existed."

It is stipulated that libelant's provable damage under the policy is $32,020 with statutory interest from July 24, 1958.

Appellee was duly notified of the charter party and agreed to add "R. W. Stasch & Co." as a named assured for the period of the charter.

The District Court concluded that the loss of the No. 12 was not covered by either the "Perils" clause or the "Inchmaree" clause because, in its view, (1) the swells created by the passing of a large vessel were not "perils of the sea" within the "Perils" clause; and (2) because Stasch was an "owner" for purposes of the proviso in the "Inchmaree" clause barring recovery for loss resulting from want of due diligence by an owner. We hold that the District Court erred on both points.

In determining the meaning of the terms of the policy we are guided by what was said in *Henies* v. *Aetna Ins. Co.*, 132 F. 2d 715, 719 (2d Cir.), cert. denied, 319 U. S. 710 (1943):

> "It is a general rule of construction that where the language of a policy of insurance may reasonably be construed in more than one way the meaning beneficial to the insured is to be given effect by resolving fair doubts against the insurer who chose the language which created them. Ashenbrenner v. United States F. & G. Co., 292 U. S. 80, 54 S. Ct. 590, 78 L. Ed. 1137; DeHart v. Illinois Casualty Co., 7 Cir., 116 F. 2d 685. That is particularly applicable to a time policy of marine insurance."

1. Perils of the Sea

This court interpreted and applied the "Perils" clause in *New York, N. H. & H. R. R.* v. *Gray*, 240 F. 2d 460 (2d Cir.), cert. denied, 353 U. S. 966 (1957). There the insured

recovered for losses sustained when water leaked into a moore l-cartfloat causing the vessel to list and settle, with a resultant loss of certain cargo. We held that:

> "The loss resulted from a 'peril of the seas.' 'It is enough that damage be done by the fortuitous action of the sea.' For instance, where cargo was damaged by the incursion of seawater through a hole in a pipe gnawed by rats, the House of Lords held this to be a peril of the seas.'* That the sea is calm makes no difference.** Negligence whether or not 'gross' but for which the accident would not have occurred, will not serve as a defense to such a policy."

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* 2 Arnold, Marine Insurance (14th ed.) Section 812.

** Judge Rifkind in *Compania T. Centro-Americana v. Alliance Ass. Co.*, D. C., 50 F. Supp. 986, 991; *Olympia Canning Co. v. Union Marine Ins. Co.*, 9 Cir., 10 F. 2d 72.

240 F. 2d at 464.[2] The gray case governs the present case. See also *Cary* v. *Home Ins. Co.*, 235 N. Y. 296, 300 (1923); *Petrie* v. *Phenix Ins. Co.*, 132 N. Y. 137, 144 (1892); *James*

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[2] Appellee attempts to distinguish the *Olympia Canning Co.* and *Compania T. Centro-Americana* cases on the ground that they were decided under English law.

A reading of these cases makes clear that the English courts have consistently given the "perils" clause a broad reading. Several early decisions in this country departed from this view, and held that "perils of the sea" pertained only to extraordinary and calamitous occurrences. See *e.g. Hazard's Administrator* v. *New England Marine Ins. Co.*, 33 U. S. (8 Peters) 557, 583 (1834); *Arbib & Houlberg, Inc.* v. *Second Russian Ins. Co.*, 294 Fed. 811, 816 (2d Cir. 1923).

We see no reason why we should not seek guidance from Eng-

A. McAllister & Co. v. Western Assurance Co., 218 App. Div. 564, 218 N. Y. S. 658 (1st Dept. 1926); *Borgemeister v. Union Ins. Soc'y*, 127 Misc. 9, 214 N. Y. S. 548 (City Ct. 1926).

The swells which caused the derrick on the No. 12 to buckle were a "fortuitous action of the sea," and therefore within the scope of the "Perils" clause.

Appellee cites us to *Continental Ins. Co. v. Patton Tully Transp. Co.*, 212 F. 2d 543 (5th Cir. 1954) and *Western Assur. Co. v. Shaw*, 11 F. 2d 495 (3d Cir.), cert. denied, 273 U. S. 698 (1926), which contain language to the effect that ordinary swells are not perils of seas or harbors within the meaning of marine insurance policies. The passages relied on by appellee contain alternate holdings, at best, since in both cases, the foundered vessels were unseaworthy. Moreover, both decisions rest on findings that swells and waves were not extraordinary under the circumstances. Both rest on the rule that "[T]here must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen." *The Xantho*, 12 App. Cas. 503, 509 (1887).

Whether the loss resulted from a "necessary incident" of the venture—i.e., from ordinary wear and tear—or from an accident which could not be foreseen depends, of course, on the nature of the vessel and operation involved.

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lish authorities. In so doing, we follow, as we did in *Gray*, a course recently approved by the Supreme Court:

"* * * [W]e and other American courts have emphasized the desirability of uniformity in decisions here and in England in interpretation and enforcement of marine insurance contracts. Especially is uniformity desirable where, as here, the particular form of words employed originated in England." (Footnotes omitted.)

Standard Oil Co. v. United States, 340 U. S. 54, 59 (1950).

Compania de Navegacion Interior, S.A. v. Fireman's Fund Ins. Co., 277 U. S. 66, 80 (1928); *Klein v. Globe & Rutgers Fire Ins. Co.*, 2 F. 2d 137 (3d Cir. 1924). In the present case, Stasch was engaged in an extremely delicate operation. Without the use of side slings, the No. 12 could tilt only three degrees without danger to the derrick. Shipping above and below the site of operations was held up, so as to prevent swells. Under these circumstances, the swells caused by the passing freighter were unanticipated and extraordinary, and constituted a "peril of the sea" within the meaning of the policy.[3]

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[3] Appellee cites us to several cases interpreting the phrase "perils of the sea", as used in bills of lading: *E.G. Ducheo v. Thomas & John Brocklebank Ltd.*, 40 F. 2d 418 (2d Cir. 1930); *The Rosalie*, 264 Fed. 285 (2d Cir. 1920); *The Giulia*, 218 Fed. 744 (2d Cir. 1914); *The Warren Adams*, 74 Fed. 413 (2d Cir.), cert. denied, 163 U. S. 679 (1896); *Dietzsch & Co. v. S.S. The Flying Trader*, 141 F. Supp. 271 (S. D. N. Y. 1956), aff'd 244 F. 2d 542 (2d Cir. 1957).

But there is a basic difference between those cases and the present case. A shipowner-carrier defending against a cargo claim can rely on a "perils of the seas" exception in a bill of lading only if he establishes that neither he nor the ship's personnel was negligent—*i.e.*, that the loss resulted from *force majeure*. But the "Perils" clause in a marine hull insurance policy covers loss caused or contributed to by such negligence.

This distinction was explained by the Supreme Court in *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397 (1889):

> "Collision or stranding is, doubtless, a peril of the seas; and a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew, because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall use due care to avoid them. [Cases cited.] But the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception, in the bill of lading, of perils of the sea or other specified perils does not excuse him from that obligation, or exempt him

II. "Inchmaree" Clause

The "Inchmaree" clause was first included in marine insurance policies to overcome the effects of a decision of the House of Lords which was adverse to the assured.[4] Its purpose was, and is, "to broaden, not restrict, to expand, not withdraw coverage." *Saskatchewan Government Ins. Office v. Spot Pack, Inc.*, 242 F. 2d 385 (5th Cir. 1957). It is with this beneficial purpose in mind that the clause must be interpreted.

The issue as to coverage under the "Inchmaree" clause is whether such coverage is excluded because Stasch's negligence was "want of due diligence by the owners of the ship, or any of them, or by the manager."

Although the district court included no express finding that Stasch was the "master" of the No. 12 at the time of the accident, its general findings comport such a conclusion, and we hold that Stasch was acting as "master" of the No. 12.

There is considerable doubt in our minds as to whether he was also the "owner" or "manager" within the meaning of the clause, although, as the district court found, his

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from liability for loss or damage from one of those perils by which the negligence of himself or his servants has contributed."

129 U. S. at 438. See also *Arbib & Houlberg, Inc. v. Second Russian Ins. Co.*, 294 Fed. 811, 816 (2d Cir. 1923).

[3] To the extent that the language in *Hecht, Levis & Kahn, Inc. v. New Zealand Ins. Co.*, 121 F. 2d 442 (2d Cir. 1941), fails to recognize this distinction, we deem it to have been overruled by *New York, N. H. & H. R. R. v. Gray*, 240 F. 2d 460, 466 (2d Cir.), cert. denied, 353 U. S. 966 (1957), where we distinguished the *Flying Trader* case, *supra*, on the ground that it involved bills of lading rather than marine insurance.

[4] *Thames & Mersey Marine Ins. Co. v. Hamilton, Fraser & Co.*, 12 App. Cas. 484 (1887). The clause takes its name from the Steamship Inchmaree involved in that case.

status was that of "owner" for a number of other purposes. It seems to us quite likely that the reason for appellant's informing the insurance company of the charter and for having Stasch added as a named assured was precisely to bring Stasch's negligence under the coverage of the policy, as well as to protect him from a claim of subrogation in case of loss through his negligence. Certainly Stasch himself could have had no claim for the loss of the vessel.

But assuming, arguendo, that Stasch was an owner or manager for purposes of the exclusion clause, we are persuaded that that exclusion was not intended to apply to the negligence of an owner who is acting as master in the operation of a vessel at sea.

Although we have found no authority directly in point, the few decisions interpreting the words "owner" and "master" lend support to our conclusion. In *Read v. Agricultural Ins. Co.*, 219 Wis. 580, 263 N. W. 632 (1935), where plaintiff sued on a policy of marine insurance containing an "inchmaree" clause, the court said:

> "There seems to us to be a clear distinction between the activities of a person acting on behalf of the owner in conditioning and launching the boat and those of a master or other officer acting professionally in the handling of the vessel at sea. If the conditioning operations culminate in launching the vessel in an unseaworthy condition, it is clear to us that there is no coverage. If there is negligence in the discharge of some professional duty in connection with handling the boat during the voyage, the 'Inchmaree' clause appears to apply."

263 N. W. at 636. See also *Founders' Ins. Co. v. Rogers*, 281 F. 2d 332 (9th Cir. 1960); *Baggaley v. Aetna Ins. Co.*, 111 F. 2d 134 (7th Cir. 1940); *Wigle v. Aetna Cas. & Sur.*

Co., 177 F. Supp. 932 (E. D. Mich. 1959); *Yacht Buccaneer*, 1940 Am. Mar. Cas. 1397 (arbitration, Chicago, 1940); *Barcadale* v. *Eagle*, 66 Lloyd's List L. R. 174, 181 (1940).

Where the owner or charterer of the vessel also acts as its master, the distinction drawn by the clause can be given effect only if it is read as referring to the function that the owner-master is performing when the acts causing the accident take place. The interpretation urged by the appellee would render the assumption of liability for "negligence of [the] master" totally ineffective in the present case.

The language of the clause as a whole reflects a recognition of the different treatment to be accorded seagoing and preparational carelessness. There is no other explanation for the use of the term "negligence" in referring to the master, and of the term "want of due diligence" in referring to the owner. Clearly the draftsman had quite different operations in mind. We conclude that the Inchmaree clause was designed to insure against seagoing or operational negligence of the master (whether or not he is also the charterer or owner), and to exclude from coverage damage due to the shoreside failure of the shipowner's managerial staff properly to prepare or equip the vessel for the voyage or service she is about to perform.

Since the accident resulted from the operational negligence of Stasch while he was acting as master of the No. 12, appellant was entitled to recover under the policy.

Finally, appellee contends that recovery is precluded by the proof of loss provision of the policy. This provision required the assured to submit proof of loss "that the Assured has used due diligence to prevent * * * loss or damage" as a condition precedent to any right of action of the assured.

Opinion of Court of Appeals

Not only was the point not raised in the court below, but it is wholly without merit. Even if we assume, contrary to authority, *O'Boyle v. Northwestern Fire & Marine Ins. Co.*, 49 F. 2d 713 (2d Cir. 1931), that the insurer did not waive such proof of loss by denying all liability before suit was brought, the "due diligence" of the assured to which the proof of loss provision refers is obviously that diligence required by the "Inchmaree" and "Perils" clauses. Clearly the proof of loss provision was not designed to add substantial new exclusions from the coverage of the policy. "Courts, in giving effect to that provision in an insurance policy, have never treated the requirement for a proof of loss as a mere trap for the unwary." *Id.* at 716.

Reversed and remanded with instructions to enter judgment for libelant.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of March one thousand nine hundred and sixty-three.

Present: Hon. J. Edward Lumbard, *Chief Judge*,
Hon. J. Joseph Smith,
Hon. Paul R. Hays,
Circuit Judges.

Allen N. Spooner & Son, Inc.,

Libellant-Appellant,

v.

Connecticut Fire Insurance Company,

Respondent-Appellee,

Red Star Towing & Transportation Company,

Respondent-Impleaded.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed and that the action be and it hereby is remanded with instructions to enter a decree for the appellant in accordance with the opinion of this court; with costs to the appellant.

A. DANIEL FUSARO
Clerk